Supreme Court, U.S.
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No. 96-778

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAMS NATURAL GAS COMPANY,
Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

RULE 29.6 STATEMENT

Petitioner Williams Natural Gas Company is a wholly owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc., that are not wholly owned by that corporation are as follows:

Altra Energy Technologies L.L.C.
American Soda, L.L.P.
Apco Argentina Inc.
Free Port Terminal Co. Limited
Kern River Gas Supply Corp.
Kern River Gas Transmission Co.
Kern River Service Corp.
Kiowa Gas Storage, L.L.C.
Nebraska Energy, L.L.C.
NES Supply Corp.
Northern Border Intermediate Limited Partnership
Northern Border Partners, L.P.
Parkco, L.L.C.
Pekin Energy Co.
Reserveco Inc.
TransNetwork Holding Co.
Tubexpress, Inc.
Williams Field Services-Gulf Coast Co., L.P.
Wiljet, L.L.C.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY TO COUNTERSTATEMENT OF THE CASE AND REASONS FOR DENYING THE WRIT 2

I. STATUTORY BACKGROUND 2

II. COMPETITIVE FRAMEWORK 4

III. STATE LAW 5

IV. JURISDICTION 5

V. PRUDENTIAL STANDARDS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Court Cases

Burns v. United States, 501 U.S. 129 (1991) 3

In re Gault, 387 U.S. 1 (1967) 4

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1981) . . . 2

Plyler v. Dole, 457 U.S. 202 (1982) 4

Rice v. Sioux City Mem'l Park Cemetery
349 U.S. 70 (1955) 9

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443
(1993) 4

Statutes and Rules

Kan. Stat. Ann § 66-117 (1995) 2

Kan. Sup. Ct. R. 8.03(e)(1) 7

Sup. Ct. R. 15.6 2

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REPLY BRIEF OF PETITIONER WILLIAMS NATURAL GAS COMPANY

The apparent overarching purpose of Kansas Pipeline Partnership's ("KPP") Response to Williams Natural Gas Company's ("WNG") Petition for Certiorari is to obfuscate the issues and hide the reality that this case presents an important issue of federal constitutional law for this Court's review. The great majority of the facts and history supplied by KPP has nothing to do with the merits of WNG's Petition or the factors

the Court typically weighs when determining whether to grant certiorari. A consideration of those factors without the interference of irrelevant facts and arguments strongly suggests that the Court should review the decision of the Kansas Court of Appeals.[1]

REPLY TO COUNTERSTATEMENT OF THE CASE AND REASONS FOR DENYING THE WRIT

I. STATUTORY BACKGROUND

KPP argues that the law with respect to "deemed approval" statutes is well-settled and should, therefore, not be addressed by the Court.[2] In doing so, KPP ignores several important facts. First and foremost, the lack of a decision interpreting a statutory scheme that offends the most fundamental concepts of due process does not render the question "long-settled" or "noncontroversial." Quite to the contrary, the 14th Amendment and the Court's interpretations of constitutional due process[3] strongly suggest that, even in the absence of any decisions interpreting Kan. Stat. Ann. § 66-

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1 WNG will not address issues raised by KPP that were discussed in WNG's Petition for Certiorari. Sup. Ct. R. 15.6. Chief among those issues is whether WNG has a constitutionally protected property interest. Brf. in Opp. at 20-24. Even if WNG's interest is not protected by the Constitution, the interest of Kansas ratepayers is protected. That interest has filed in support of WNG's Petition through its statutory representative, the staff of the Kansas Corporation Commission ("KCC"). Moreover, the ratepayers represented by the Kansas Citizens' Utility Ratepayer Board ("CURB") certainly have a protected interest as the party responsible for paying for the contracts KPP proposed. CURB filed its own Petition in Docket No. 96-956 raising the same issue presented here.

2 Brf. in Opp. at 5.

3 Logan v. Zimmerman Brush Co., 455 U.S. 422, 434-35 (1981).

117(b) (the "Statute"), the validity of the Statute, and specifically the interpretation of the Statute rendered by the Kansas Court of Appeals, is quite clearly unsettled and controversial. KPP's attempt to recast WNG's argument should be rejected.

WNG does not claim that time limits are new or even that no time limit statute can be sustained. Rather, WNG's Petition raises a specific constitutional infirmity in a statute as applied by the Kansas Court of Appeals. That application is new and deprives WNG of its right to due process of law. The issue presented by WNG's Petition is exactly the sort of issue the Court has reviewed in the past and should review here.

Much of KPP's response is devoted to a policy justification for the substance of the Statute.[4] While that discussion may be of some political significance, it means nothing in the face of this due process challenge. The wisdom of the Kansas legislature in enacting the Statute says absolutely nothing about whether WNG was entitled to due process or whether the process WNG received was the process it was due.[5] Similarly, the thinking of the Kansas legislature says nothing about whether the issue presented here is important or whether the law is unsettled. The issue presented in WNG's Petition is an important unsettled question of federal constitutional law and should be reviewed by the Court.

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[4] Brf. in Opp. at 3-5.

[5] E.g., Burns v. United States, 501 U.S. 129, 146-48 (1991).

II. COMPETITIVE FRAMEWORK

KPP's lengthy statement and argument about the history of competition between WNG and KPP[6] is another transparent attempt to shift the Court's focus from an important constitutional issue to a variety of competitive issues that have been the subject of other administrative and court proceedings, none of which are before the Court. WNG is entitled to the same due process protection whether or not it competes with KPP and regardless of which entity has a greater share of the market. WNG's rights are the same even if KPP's somewhat veiled allegations of competitive wrong-doing are correct.[7] Of even less impact is the nature or duration of the contractual relationship between WNG and Western Resources, Inc. ("WRI").[8]

KPP's continual suggestions of inappropriate competition by WNG are its predictable response when faced with legitimate arguments. Those allegations, however, do not impact WNG's due process rights or the merits of its constitutional claim.

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[6] Brf. in Opp. at 5-8.

[7] Plyler v. Dole, 457 U.S. 202, 210 (1982) (illegal aliens); see In re Gault, 387 U.S. 1, 80 (1967) (Stewart, J., dissenting) ("A State in all its dealings must, of course, accord every person due process of law."). Due process review is available for awards of punitive damages. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993). Thus, even those corporations who have been found culpable are afforded due process protection.

[8] Brf. in Opp. at 8, n. 15.

III. STATE LAW

WNG disagrees with the substantive interpretation of the Statute by the Kansas courts and does not attempt to hide that fact from this Court.[9] WNG's Petition, however, is based strictly on the important federal question presented by the case. The Petition is addressed only to the constitutionality of the Statute as applied by the Kansas Court of Appeals. That application resulted in a final decision without the benefit of a hearing and decision on the merits. The failure to permit a decision on the merits at some point in the process is a clear violation of WNG's due process rights. The Kansas Court of Appeals incorrectly interpreted the Statute, but that fact does not impact WNG's Petition and is not before the Court.

WNG does not argue that its constitutional rights are violated by a lack of uniformity of judicial decisions, by judicial error, or by misapplication of state law as KPP has attempted to argue.[10] Instead, WNG asserts that its due process rights have been impaired by a statute that, based on the interpretation of the Court of Appeals, denies WNG the right to a decision on the merits.

IV. JURISDICTION

KPP's jurisdictional claim rests primarily on the argument that WNG had an opportunity to raise its due process argument earlier but waived the issue by failing to raise it. That claim is unsupported by the record.

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[9] Pet. for Cert. at 4, n.4.

[10] Brf. in Opp. at 17.

The KCC began this proceeding by determining that the 240-day time limit imposed by the Statute, if it applied at all, was started anew by the intervention of the Federal Energy Regulatory Commission's ("FERC") claim of jurisdiction over KPP. WNG had no occasion to question the KCC's ruling or seek rehearing because that decision did not deprive WNG of its constitutional right to due process of law. Similarly, when the KCC issued its decision after rehearing, WNG had no reason to complain because its due process rights had not been impaired. This is the sole reason that WNG did not cross-petition for review and the sole reason the issue was not included in WNG's filings with the KCC or in its briefs filed with the Court of Appeals.

In its argument to the Court of Appeals, WNG, consistent with its position throughout this proceeding, supported the KCC's conclusion that the Contracts were not deemed approved by operation of law. There was no reason to make a constitutional argument because at that point there was no constitutionally infirm decision. It was only when the Court of Appeals determined that the Contracts had been approved, although there had never been a decision on the merits, that WNG's due process rights were offended. WNG then raised its constitutional claims at the earliest possible time, by a motion for rehearing with the Court of Appeals, and reasserted those claims in its Petition for Review addressed to the Kansas Supreme Court.

KPP argues that review by the Kansas Supreme Court was discretionary and therefore the denial of review must necessarily be based on WNG's failure to raise the constitutional issue at the appropriate time.[11] The decision of the Kansas Supreme Court includes no such ruling, however.

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[11] Brf. in Opp. at 14-15.

In fact, it is apparent that the Kansas Supreme Court's decision was based on its disagreement with WNG's interpretation of constitutional due process rather than a defect in raising the issue. It is clear from the discussion above that the due process issue arose for the first time following the decision of the Kansas Court of Appeals. Thus, under Kansas law, if WNG's constitutional argument had merit, appeal to the Kansas Supreme Court was by right.[12] That court's decision not to review the matter must therefore have been a determination that WNG's constitutional argument had no merit. This Court clearly has jurisdiction to review that decision.

The jurisdictional issue is easily resolved by understanding the manner in which the due process issue arose. The Court will recall that WNG does not complain about any action or interpretation by the KCC, the initial trier of fact. Instead, WNG's constitutional challenge is directed solely to the interpretation of the Statute included in the decision of the Kansas Court of Appeals. This fact not only distinguishes this matter from the cases cited by KPP[13], but also explains quite clearly why WNG did not raise its constitutional argument until its request for rehearing before the Court of Appeals. This Court's jurisdiction is not removed when the party raising a constitutional question raises it at the earliest time possible following the unconstitutional statutory interpretation.

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[12] Kan. Sup. Ct. R. 8.03(e)(1). The rule provides that only cases in which the constitutional issue arises for the first time in the opinion of the Court of Appeals can be appealed as a matter of right. If KPP's theory were correct, no case would result in mandatory appeal because a constitutional issue not raised prior to the Court of Appeals' opinion would be waived. KPP's circular argument should be rejected.

[13] Brf. in Opp. at 14-16.

V. PRUDENTIAL STANDARDS

KPP's prudential arguments are entirely without merit. KPP first suggests that WNG has received benefits from the Statute and may not now argue that it is unconstitutional.[14] KPP's argument is factually incorrect. WNG did not submit pleadings under the authority of the Statute. In fact, WNG argued before the KCC that this was a rate case and therefore subject to the procedures outlined in the Statute, in addition to other procedural protections. The KCC specifically denied WNG the benefits it sought from the Statute.[15] WNG has never sought compensation under the Statute and KPP makes no allegation that WNG has received such compensation. KPP's claim that WNG received benefits from the Statute is wrong because it is based on facts that are clearly false.

KPP next suggests that if the Court declares the Statute unconstitutional, WNG will be unable to receive the relief it seeks.[16] KPP argues that the KCC's suspension of the Contracts will be ineffective if the Statute is unconstitutional and the Contracts will be effective as a result. KPP's argument misconstrues the relief sought by WNG. WNG asks the Court to invalidate the Court of Appeals' interpretation of the Statute, which removes the right to a decision on the merits. There are several ways to achieve that end. To avoid the due process problem, the Contracts could have gone into effect after the statutory period subject to the later decision of the KCC on the merits of the application. In fact, several state statutes reach

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[14] Id. at 18.

[15] Pet. for Cert. at 11-12.

[16] Brf. in Opp. at 18-19.

exactly that result.[17] Alternatively, the Statute, contrary to KPP's assertion, can be severed so that the only constitutionally offensive provision, the "deemed approved" language, is excised from the Statute. In either case, WNG would be entitled to a decision on the merits, which is all the relief it seeks here.

KPP's final prudential argument relies on its assertion that this case is or may become moot in the near future.[18] KPP's argument is wrong because this case represents a real, on-going dispute among the parties that is neither academic nor episodic.[19] KPP argues that through the transfer of interests in the Contracts and the potential assertion of federal jurisdiction by FERC, the KCC may no longer have jurisdiction to determine the merits of this dispute by the time this Court decides the case. This assertion might be true if the pending matters consisted only of KPP's effort for authority to put a single contract into effect. In reality, this case involves much more. The decision of the Court of Appeals gave approval not just to a single contract but also to several other contracts that continue to be subject to KCC jurisdiction. Moreover, this case also involves $5.9 million in project development costs. KPP currently claims at FERC that the decision of the Court of Appeals means KPP is entitled to recover those project development costs and that FERC should adopt that conclusion even though there has been no ruling on the merits. This Court's decision will clearly resolve that very real issue even if FERC finally takes jurisdiction and KPP assigns the Contracts to others. In short, there is nothing FERC can do by taking

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[17] Pet. for Cert. at 16-17 & n.28.

[18] Brf. in Opp. at 19-20.

[19] Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955).

jurisdiction, or that KPP can do by assigning the Contracts, that will render this dispute moot.

CONCLUSION

When the Court clears away the irrelevant matter raised by KPP it is left with KPP's jurisdictional and prudential claims. This Court has jurisdiction over the due process claim because WNG raised the issue at the first possible juncture, which in this case occurred at the rehearing stage in the Court of Appeals. KPP's claim that the issue should have been raised at the KCC is spurious because the KCC did not violate WNG's due process rights. KPP's prudential arguments are similarly flawed. WNG did not accept compensation under the Statute, the relief WNG seeks is available, and there is no chance that this case is or will become moot.

WNG's Petition raises a real and important Federal Constitutional question. The Court should grant the Petition and resolve the clear conflict between the 14th Amendment and the Statute as applied by the Kansas Court of Appeals.

Respectfully submitted,

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